

or deliberately misled Senator McCain, it would lend credence to the argument that he was trying to conceal something unsavory about the Hudson decision.⁸⁶⁰

b. Babbitt's Testimony About His Letter to McCain Was Material to the Senate Committee on Governmental Affairs

As noted above, perjury requires that the false statement made under oath be material to the proceeding in which the statement was provided. Babbitt's testimony concerning his intent in writing Sen. McCain was material to the Senate Committee. As discussed above in Section II.C.1.b., to be material, testimony need not have actually influenced, misled or hampered the proceeding,⁸⁶¹ and even may relate only to a subsidiary issue under consideration⁸⁶² or to an issue of credibility.⁸⁶³ Materiality is at heart a factual issue for the jury. *See Gaudin*, 515 U.S. at 509.

The hearing in which Babbitt testified was intended in part to explore whether corrupt influence had affected the Hudson casino decision. A conclusion by the Committee that Babbitt had lied to McCain would support the view that he was hiding corruption in the Hudson decision.

⁸⁶⁰Babbitt does not deny (nor does he admit) that these concealment motives were at play at the time he signed his response to Sen. McCain. Twice, Babbitt passed up the opportunity to state under oath that he did not mislead McCain in order to stave off further investigation by McCain about the role of Ickes and the White House in the Hudson casino decision. Instead, when asked whether he knew at the time that admitting to having invoked Ickes's name would almost certainly lead to further investigation into Ickes's role, Babbitt simply stated that he had "no recollection of thinking that." Babbitt G.J. Test., July 7, 1999, at 220. When asked virtually the same question a few minutes later, Babbitt stated: "I can't tell you what was on my mind at that time, when I wrote that letter, specifically, I really can't." *Id.* at 231.

⁸⁶¹*United States v. Harrison*, 671 F.2d 1159, 1162 (8th Cir. 1982); *United States v. Brown*, 666 F.2d 1196, 1200 (8th Cir. 1981); *United States v. Whimpey*, 531 F.2d 768, 770 (5th Cir. 1976); DOJ Manual at 9-1497.

⁸⁶²*United States v. Percell*, 526 F.2d 189, 190 (9th Cir. 1975).

⁸⁶³*United States v. Nacrelli*, 543 F. Supp. 798, 800 (E.D. Pa. 1982).